

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.682.8000
FAX 202.682.8281
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

ROBERT K. KELNER
TEL 202.682.8603
FAX 202.778.5503
RKELNER@COV.COM

June 4, 2007

BY FACSIMILE AND FIRST CLASS MAIL

Tracey Ligon, Esq.
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5871

Dear Ms. Ligon:

We write on behalf of our client Samuel Thurber in response to the Commission's letter finding reason to believe that Mr. Thurber violated the Federal Election Campaign Act. As you know, we have requested pre-probable cause conciliation on Mr. Thurber's behalf. Pending receipt of a response to that request, we are submitting this preliminary response to the Commission's reason to believe letter.

The Commission alleges that in 2003 Mr. Thurber made a \$1,950 conduit contribution to Bush-Cheney '04, Inc., in violation of 2 U.S.C. § 441f, and that the true source of the contribution was Thomas Noe, who has since pleaded guilty to various federal offenses. The Commission further alleges that Mr. Thurber acted knowingly and willfully. Mr. Thurber cooperated extensively with the United States Attorney's Office for the Northern District of Ohio in connection with the Noe investigation. He has never disputed that he accepted funds from Mr. Noe in an amount comparable to the sum that he and his wife contributed to Bush-Cheney '04. Mr. Thurber's actions did not, however, rise to the level required to satisfy the high standard for a knowing and willful violation. Moreover, given the small dollar amount of the contribution at issue (\$1,950), Mr. Thurber's extensive cooperation with federal law enforcement authorities,

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2007 JUN -5 A 9 20

28044210987

Tracey Ligon, Esq.

June 4, 2007

Page 2

and the high price he and his wife have already paid in connection with this matter, the equities weigh heavily in favor of a rapid and modest negotiated resolution.

I. The Alleged Actions Do Not Rise To The Level Of A "Knowing & Willful" Violation Of 2 U.S.C. § 441f.

To support a finding that Mr. Thurber knowingly and willfully violated § 441f, the Commission must establish that he knew of the federal prohibition against conduit contributions and that he nevertheless intentionally acted in violation of the law. *See United States v. Trie*, 21 F. Supp. 2d 7, 16 (D.D.C. 1998) ("[T]he Court therefore concludes that a showing of 'willfulness' requires proof that [the defendant] knew of the . . . reporting obligations, that he attempted to frustrate those requirements, *and that he knew his conduct was unlawful.*") (emphasis added).

When Congress amended the FECA in 1976, it recognized that the statute could present potential traps for the unwary. *See Trie*, 21 F. Supp. 2d at 15-16 (quoting 122 Cong. Rec. 8577 (March 30, 1976) (statement of Representative Rostenkowski) ("I am more concerned, however, about the provisions in the [pre-1976] law that provide harsh penalties for what may be innocent and often unknowing violations of its more technical requirements. . . ."). Accordingly, the committee report that accompanied the 1976 amendments to the FECA explained that the "knowing and willful" requirement in 2 U.S.C. § 437g(d)(1) was intended to apply where "the acts were committed with a knowledge of all the relevant facts and a recognition that the action is *prohibited by law.*" H.R. Rep. No. 94-917, at 4 (1976) (emphasis added).

The facts alleged in the Commission's reason to believe letter do not support a claim that Mr. Thurber knew that his actions were prohibited by law. As the Commission is aware, Mr. Thurber was interviewed by the FBI as part of the U.S. Attorney's investigation of the Noe matter. Mr. Thurber did not tell the FBI that he was aware of the federal law prohibiting

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2007 JUN -5 A 9 20

28044210988

COVINGTON & BURLING LLP

Tracey Ligon, Esq.

June 4, 2007

Page 3

conduit contributions, nor did he tell the FBI that he knew it was illegal to make a conduit contribution.

II. The Equities Favor A Modest And Rapid Resolution

For a number of reasons, this matter deserves a modest, negotiated resolution. *First*, without trivializing any alleged violation of the FECA, the \$1,950 amount at issue here does not suggest the need for extensive investment of the Commission's resources in investigating and litigating this matter.

Second, Mr. Thurber has thoroughly and without reservation cooperated with the United States Attorney in this matter. He submitted voluntarily to an interview with federal agents. He testified before the grand jury. He made himself available, if needed, to testify at trial. The U.S. Attorney did not take any action against Mr. Thurber and assured Mr. Thurber that he would not be prosecuted. In recent correspondence with counsel for Mr. Thurber, the U.S. Attorney's Office formally confirmed that Mr. Thurber provided "complete and truthful cooperation" in connection with the Noe investigation. See Attachment 1.

Third, Mr. Thurber has already paid a steep price for making that \$1,950 contribution. His wife's political career is over. She is now unemployed. Mr. and Mrs. Thurber had spent a great deal of their own money to finance Mrs. Thurber's campaigns, even taking out a mortgage on their house for this purpose. They now have no prospect of recovering any of those funds. At the time the contributions were made in 2003, Mr. Thurber had just started his own small engineering consulting business. As a result of the Thurbers' involvement in the Noe case, it has been difficult for him to secure adequate work in his local community, Toledo, Ohio. The Thurbers also incurred significant attorneys' fees in the course of the United States Attorney's investigation.

In sum, the facts and circumstances suggest that this is not a case that calls out for the Commission's continued attention, especially in light of the prior, thorough investigation by the U.S. Attorney's Office.

28044210989

COVINGTON & BURLING LLP

Tracey Ligon, Esq.

June 4, 2007

Page 4

III. Responses To Factual Questions Posed By The Staff

At our meeting on May 29, 2007, you requested that we provide the following information: the time frame during which Mr. Thurber served on the Lucas County Board of Elections; a description of the duties of a member of the Board of Elections; a description of Mr. Thurber's activities with respect to the Board; and the types of training Mr. Thurber received as a member of the Board. We address below each of these requests, to the extent responsive information is currently available to us.

A. Mr. Thurber's Time of Service on the Lucas County Board of Elections

Mr. Thurber was a member of the Board of Elections from August 2002 to approximately March 2005.

B. Duties of Members of Ohio County Boards of Election

Local election boards in Ohio are composed of four members, with two members appointed by each major party. One position from each party typically is held by the party chairperson. The second seat is filled by whoever is selected by the respective party's executive board. See Ohio Rev. Stat. § 3501.07. The office is run on a day-to-day basis by a director and deputy director, one from each party. Additionally, the staff is equally divided between the Republican and Democratic parties. The members of the board typically do not take on any of the daily duties of the office, but they may assist the employees occasionally.

Ohio Revised Code § 3501.11 sets forth in detail the duties of county boards of elections in Ohio. The complete text of this statutory provision is attached to this letter. See Attachment 2. The most significant responsibilities of board members include establishing election precincts, purchasing and maintaining polling machines, overseeing board of election employees, and certifying election returns. Local boards of election also may investigate election irregularities. While staff of the local boards of election review campaign finance reports filed with the boards, board members ordinarily would not review the reports themselves.

28044210990

COVINGTON & BURLING LLP

Tracey Ligon, Esq.
June 4, 2007
Page 5

C. Duties Performed by Mr. Thurber During His Service on the Lucas County Board of Elections

Mr. Thurber was chosen to be one of the Lucas County Republican Party's representatives on the Board of Elections in 2002 in part because the County was in the process of converting from mechanical to electronic voting machines. Mr. Thurber is an electrical engineer and it was thought he could provide valuable technical assistance in the implementation of the new electronic voting machines. In addition to his work on technological matters related to voting machines, Mr. Thurber was involved in approving budgets, making staffing decisions, certifying election results, approving reorganized precincts, and general direction of the office.

D. Training Received by Mr. Thurber

Twice a year, members of the Lucas County Board of Elections and some staff members are required to attend conferences sponsored by the Ohio Secretary of State. These conferences are a form of continuing education provided by the state, and board members are required to complete a certain number of "courses" per year to maintain their standing on the board. Many of the courses during Mr. Thurber's tenure on the Board addressed the application of the Help America Vote Act to Ohio election law. Prominent issues included the requirement of electronic voting machines, a statewide voter database, and the statewide communication network that the Secretary of State was building at the time.

If you have further questions, please let us know. We look forward to the Commission's response to our request for pre-probable cause conciliation.

Respectfully submitted,



Robert K. Kelner

Enclosure

28044210991

~~Western~~

Page 1

R.C. § 3501.11

Baldwin's Ohio Revised Code Annotated Currentness

Title XXXV. Elections

Chapter 3501. Election Procedure; Election Officials (Refs & Annos)Board of Elections

→ 3501.11 Duties of board

Each board of elections shall exercise by a majority vote all powers granted to the board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall do all of the following:

- (A) Establish, define, provide, rearrange, and combine election precincts;
- (B) Fix and provide the places for registration and for holding primaries and elections;
- (C) Provide for the purchase, preservation, and maintenance of booths, ballot boxes, books, maps, flags, blanks, cards of instructions, and other forms, papers, and equipment used in registration, nominations, and elections;
- (D) Appoint and remove its director, deputy director, and employees and all registrars, judges, and other officers of elections, fill vacancies, and designate the ward or district and precinct in which each shall serve;
- (E) Make and issue rules and instructions, not inconsistent with law or the rules, directives, or advisories issued by the secretary of state, as it considers necessary for the guidance of election officers and voters;
- (F) Advertise and contract for the printing of all ballots and other supplies used in registrations and elections;
- (G) Provide for the issuance of all notices, advertisements, and publications concerning elections, except as otherwise provided in division (G) of section 3501.17 of the Revised Code;
- (H) Provide for the delivery of ballots, pollbooks, and other required papers and material to the polling places;
- (I) Cause the polling places to be suitably provided with voting machines, marking devices, automatic tabulating equipment, stalls, and other required supplies. In fulfilling this duty, each board of a county that uses voting machines, marking devices, or automatic tabulating equipment shall conduct a full vote of the board during a public session of the board on the allocation and distribution of voting machines, marking devices, and automatic tabulating equipment for each precinct in the county.
- (J) Investigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons; administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and report the facts to the prosecuting attorney;
- (K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers, and, after certification, return to the secretary of state all petitions and nomination papers that the secretary of state forwarded to the board;
- (L) Receive the returns of elections, canvass the returns, make abstracts of them, and transmit those abstracts to the proper authorities;
- (M) Issue certificates of election on forms to be prescribed by the secretary of state;

28044210992

R.C. § 3501.11

(N) Make an annual report to the secretary of state, on the form prescribed by the secretary of state, containing a statement of the number of voters registered, elections held, votes cast, appropriations received, expenditures made, and other data required by the secretary of state;

(O) Prepare and submit to the proper appropriating officer a budget estimating the cost of elections for the ensuing fiscal year;

(P) Perform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state;

(Q) Investigate and determine the residence qualifications of electors;

(R) Administer oaths in matters pertaining to the administration of the election laws;

(S) Prepare and submit to the secretary of state, whenever the secretary of state requires, a report containing the names and residence addresses of all incumbent county, municipal, township, and board of education officials serving in their respective counties;

(T) Establish and maintain a voter registration of all qualified electors in the county who offer to register;

(U) Maintain voter registration records, make reports concerning voter registration as required by the secretary of state, and remove ineligible electors from voter registration lists in accordance with law and directives of the secretary of state;

(V) Give approval to ballot language for any local question or issue and transmit the language to the secretary of state for the secretary of state's final approval;

(W) Prepare and cause the following notice to be displayed in a prominent location in every polling place:

"NOTICE

Ohio law prohibits any person from voting or attempting to vote more than once at the same election.

Violators are guilty of a felony of the fourth degree and shall be imprisoned and additionally may be fined in accordance with law."

(X) In all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the director or chairperson shall submit the matter in controversy, not later than fourteen days after the tie vote or the disagreement, to the secretary of state, who shall summarily decide the question, and the secretary of state's decision shall be final.

(Y) Assist each designated agency, deputy registrar of motor vehicles, public high school and vocational school, public library, and office of a county treasurer in the implementation of a program for registering voters at all voter registration locations as prescribed by the secretary of state. Under this program, each board of elections shall direct to the appropriate board of elections any voter registration applications for persons residing outside the county where the board is located within five days after receiving the applications.

(Z) On any day on which an elector may vote in person at the office of the board or at another site designated by the board, consider the board or other designated site a polling place for that day. All requirements or prohibitions of law that apply to a polling place shall apply to the office of the board or other designated site on that day.

(2006 H 3, eff. 5-2-06; 2001 H 5, eff. 8-28-01; 1997 H 213, eff. 6-30-97; 1995 H 99, eff. 8-22-95; 1994 S 300, eff. 1-1-95; 1986 H 555, eff. 2-26-86; 1980 H 1062; 1977 S 125; 132 v H 1; 131 v S 257; 125 v 713; 1953 H 1; GC 4785-13)

HISTORICAL AND STATUTORY NOTES

28044210993